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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Hon. Marlene Dortch
Secretary
Federal Communications Commission
445 12th St. S.W.
Suite TW-A325
Washington, D.C. 20554

Dear Ms. Dortch:

RE: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204

On behalf of forty-eight organizations that generally support the Commission's proposals in this proceeding, we respectfully present this omnibus response to new assertions contained in reply comments, in testimony presented in the Commission's June 24, 2002 en banc hearing, and in several subsequent ex parte letters.

A response is necessary in light of new arguments and theories put into the record by the Named State Broadcasters Associations ("STBAs") and the National Association of Broadcasters ("NAB"). These arguments and theories extend far beyond the requirements or implications of Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 353, rehearing denied, 154 F.3d 487, rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998) ("Lutheran Church") or MD/DC/DE Broadcasters Ass'n. v. FCC, MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13, petition for rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom. MMTC v. FCC, 122 S.Ct. 920 (2002) ("MD/DC/DE Broadcasters").

This letter will not respond to those allegations in reply comments and subsequent filings that are already addressed in our initial comments. Instead, we focus herein only on these issues:

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1. Which of the leading EEO proposals in this proceeding is the most reasonable. 1/

2. Whether there is evidence of discrimination in broadcasting and cable. 2/ In particular, we present almost irrefutable evidence that large broadcast and cable companies discriminate, as follows:

   Cable and Other Pay TV Services: 19% discriminate against women, 36% discriminate against African Americans, and 20% discriminate against Hispanics.

   Radio and TV Broadcasters: 15% discriminate against women, 20% discriminate against African Americans, and 24% discriminate against Hispanics.

3. Whether, after the EEO rules were suspended after Lutheran Church, many broadcasters abandoned systematic efforts to ensure equal opportunity. 3/

4. Whether broad recruitment efforts are useful. 4/

5. Whether broadcast hiring is an "insular process." 5/

6. Whether the question of how to use Form 395 should be addressed in this proceeding, and, if it is, whether there is any basis for terminating its use or limiting its usefulness. 6/

7. Whether petitioners to deny commonly, or even occasionally, bring EEO litigation that is without foundation, or that somehow induces "reverse discrimination", or that is improperly motivated or conducted. 7/

1/ See p. 3 infra.

2/ See p. 5 infra.

3/ See p. 18 infra.

4/ See p. 23 infra.

5/ See p. 24 infra.

6/ See p. 27 infra.

7/ See p. 32 infra.

The materials to which we respond are the National Association of Broadcasters Reply Comments, filed May 29, 2002 ("NAB Reply Comments"); the Named State Broadcasters Associations Reply Comments, filed May 29, 2002 ("STBAs Reply Comments"); the "NAB EEO Views and Proposal," dated July 23, 2002 (appended to notices of ex parte communication filed July 24, 2002 (meeting with Catherine Bohigan, Stacy Robinson, Roy Stewart, Mary Beth Murphy, Jamila Bess-Johnson, Lewis Pulley and Roy Boyce), August 7, 2002 (meeting with Susan Eid and Jordan Goldstein), and August 26, 2002 (meeting with Jane Mago, Michele Ellison, Joel Kaufman, Marilyn Sonn and Louis Peraertz) ("NAB EEO Views"); and the NAB ex parte letter to Hon. Marlene Dortch, August 13, 2002 ("NAB August 13 Letter"). Page references to the transcript of the Commission's June 24, 2002 en banc EEO hearing are given as "Tr."

The STBAs and NAB take the inconsistent positions that (1) there is no discrimination, but (2) in case there is, the Commission should make it impossible for listeners and viewers ever to prove it. We maintain that it is not a proper purpose of government to help regulatees conceal and evade responsibility for unlawful behavior.

1. The EEO Supporters' Proposal Is The Most Effective One Introduced In This Proceeding

On August 1, 2002, in a Notice of Ex Parte Communication, counsel for the STBAs provided a draft of a new rule based on the STBAs' proposals. 8/ A side-by-side comparison of STBAs' proposal, the NAB's proposal, and other EEO regulatory paradigms over the years is provided in the table on p. 4 infra.

8/ See MMTC "Motion for Procedural Relief", filed January 29, 2002, urging, inter alia, that the Commission "place in the docket a draft of the language of the proposed rules." One issue on which we agree with the STBAs is that it would have been preferable for the Commission to include draft language of a proposed rule in its NPRM. Nonetheless, we also recognize that an agency is free to adopt a rule without first issuing formal draft rule language, as long as the parties have reasonable notice of the range of alternatives that the agency might adopt.

COMPARISON OF EEO REGULATORY PARADIGMS

Attribute	1971-1998 EEO Rules	2000 EEO Rules	STBAs Proposal	NAB Proposal	EEO Suprts. Proposal
Bans intentional discrimination	Yes	Yes	Yes	Yes	Yes
Acknowledges present effects of past discrimination	Yes	Silent on this question	No	No	Yes
Acknowledges that discrimination still exists	Yes	Yes	No	No	Yes
Acknowledges need to prevent discrimination	Yes	Yes	No	No	Yes
Recruitment expected for all vacancies	Yes, after 1976	Yes	Only 50% of all vacancies	None required	Yes
Broad outreach, to build applicant pool and attract newcomers to the industry, is expected	No	Yes	No	Yes (but can be avoided)	Yes
Employment statistics would be available able in intentional discrimination cases	Yes	Yes	No	No	Yes
Public is afforded an opportunity to prove intentional discrimination	Seldom	Untested	Unclear	Unclear	Seldom
Employment statistics would be available to assess the reasonable-ness of recruitment	Yes, in theory	No	No	No	No
Public can meaning-fully assess whether recruitment was reasonable (without using employment statistics)	Seldom	Seldom	No	No	Seldom
"Small station" exemption	No	No	No	Yes	No

2. There Is Overwhelming Evidence Of Continuing Discrimination In Broadcasting

The STBAs have stepped with both feet into the realm of historical revisionism and discrimination denial:

> The broadcast industry *today* is engaging in widespread, non-discriminatory, vigorous, voluntary efforts to make opportunity available to all who have the desire, talent and perseverance needed for a successful broadcast career...neither the Commission nor [civil rights organizations] have produced, nor can they produce, any evidence of widespread discrimination in the broadcast industry *today or in the recent past* that would require special regulation and remedies to be imposed *today*. 9/

Apparently it was not enough for the STBAs to announce that we cannot "produce evidence of widespread discrimination in the broadcast industry[.]" 10/ The STBAs have gone even further, attempting to make such proof by the customary means -- scientific evidence -- impossible and unavailable. They declare that the Commission cannot consider industrywide statistics in deciding whether regulation is appropriate because "any attempt to establish a target level of representation for any group within society would amount to a quota system that would again entangle the Commission in precisely the same equal protection defects that led [to] Lutheran Church." 11/

The Commission has not proposed to "establish a target level of representation" industrywide, much less for each station. Instead, it simply proposes to look at the representation of minorities and women throughout the industry in an effort to determine whether regulation aimed at eliminating the present effects of past discrimination is warranted. 12/

9/ STBAs Reply Comments, p. 8 (emphasis in original).

10/ Id.

11/ STBAs Reply Comments, p. 14.

12/ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second NPRM), 16 FCC Rcd 22843, 22858 ¶50 (2001).

Further, there is no other way, besides using racial statistics, that the government can determine whether race discrimination has ended. 13/ The Commission can hardly send broadcasters a questionnaire that asks "how many times have you discriminated in the past year" and expect honest answers. 14/ Recognizing the necessity of using statistics to estimate the prevalence of discrimination, the Supreme Court has repeatedly endorsed this kind of industrywide analysis, which arises in cases as diverse as voting rights 15/ and jury composition. 16/ The appropriateness of using racial statistics has never arisen in equal employment litigation because -- until the 1999 FCC EEO rulemaking proceeding and this proceeding -- no party in any tribunal has ever advocated the repeal of a law or regulation

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13/ For example, the NAB used EEO-1 data to make the point that the broadcasting industry does not need EEO regulation. See NAB Reply Comments, pp. 9-10, discussed at p. 8 infra. Although the NAB misinterpreted these statistics, the NAB's use of them was fair advocacy and it does not drag the Commission down the path toward a "quota system."

14/ With their licenses on the line, all broadcasters will surely state that they do not discriminate -- just as all broadcasters have always certified on Form 396 that they do not discriminate. But broadcasters are human beings, and not all human beings tell the truth all the time. Some idea of the propensity of broadcasters to misstate key business facts is given in a recent report in TV Business Confidential, which observes that "[m]edia buyers maintain that a significant number of ads -- especially for local media like spot TV, radio and cable, are either run incorrectly or not run at all." "Trust, but Verify," TV Business Confidential, June 20, 2002, p. 1 (quoting Jon Mandel, co-managing director and chief investment officer at Grey's MediaCom unit, who states that "[t]he conservative estimate is about 5%, but it's probably more than like 20% or 30%.")

15/ See, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960) (holding that a change in city boundaries from a square to a 28-sided figure, which excluded 99% of the Black voters and no White voter, constituted racial discrimination violative of the 15th Amendment).

16/ See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986) (taking account of the race of jury venire members in order to hold that race-based peremptory challenges in a criminal petit jury might in some circumstances violate the equal protection clause).

designed to prevent race and gender discrimination in employment. 17/ America's nonminority broadcast trade organizations are the only organizations in the nation seeking to turn the civil rights clock back in this manner.

For its part, the NAB made the startling allegation that "the Commission has admitted that no pattern of discrimination exists in the broadcasting industry." 18/ The NAB's syllogism is:

17/ In this regard, it is useful to consider the position taken by the prominent conservative opponent of affirmative action, U.C. Berkeley Professor John McWhorter, in opposing the so-called "Racial Statistics Privacy Act", a ballot initiative being promoted by Ward Connerly. This proposed law -- much like the proposal of the STBAs in this proceeding -- would prevent the government (the State of California) from using racial statistics even to fight race discrimination -- although the Racial Statistics Privacy Act would allow the use of these statistics by police for "racial profiling." Dr. McWhorter points out that conservatives "need the statistics to help make the case that [affirmative action measures] are not necessary for there to be a representative number of black students at good universities." "The Conservative Professor Who Opposes Ward Connerly's Racial Privacy Policy," Journal of Blacks in Higher Education, Summer, 2002, p. 49. Columbia University Law Professor Patricia J. Williams accurately points out that Connerly's ballot initiative "is not about 'privacy' as most laypeople think of it. It is actually about privatizing racially based behavior [by] [e]liminating official knowledge of race and ethnicity in the public sphere." Patricia J. Williams, "Racial Privacy," The Nation, June 17, 2002, p. 9.

18/ NAB Reply Comments, p. 8 n. 24 (emphasis supplied).

a. If the Commission finds discrimination, it cannot grant a license renewal (a true fact; see 47 U.S.C. §309(k)).

b. The Commission seldom denies license renewal applications (another true fact).

c. It follows that there must be no discrimination in the industry. 19/

The NAB's syllogism is illogical. The correct conclusion from the premises given would be that the Commission has found no discrimination -- not that there was none. Of course the Commission -- with no EEO field staff and virtually no EEO investigatory powers -- seldom uncovers discrimination. Most discrimination is hidden, and it is easy to hide. Certainly there are powerful incentives to hide it from the Commission, 20/ and there are even more powerful incentives for discrimination victims to grit their teeth and avoid the retaliation and expense that befalls those filing discrimination complaints -- complaints the FCC routinely sends to the EEOC, where they face a backlog of up to seven years. 21/ Thus, the only cases in which the Commission has been able to designate for hearing have been those where the broadcaster has been both dishonest and careless enough to misrepresent its EEO efforts, causing the FCC to infer the presence of intentional discrimination. 22/

The NAB also points to statistics showing that in 2000, among broadcasters large enough to file Form EEO-1, "minorities and women were 22.5% and 41.5% of the reporting broadcasting companies' workforce, respectively." 23/ The NAB asserts that "[w]hile these figures may not suit the tastes of MMTC, NOW and certain other commenters, NAB believes it is undeniable that an industry workforce consisting of almost one-quarter minorities, and more than 40% women is far from 'homogeneous.'" 24/

19/ Id.

20/ See Comments of EEO Supporters (filed April 15, 2002), ("EEO Supporters Comments"), pp. 44-45.

21/ Id., pp. 43-44. As Justice O'Connor has pointed out, "[v]ictims of discrimination want jobs, not lawsuits." EEOC v. Ford Motor Co., 458 U.S. 210, 230 (1982).

22/ See, e.g., EEO Supporters Comments, p. 121 n. 256 and cases cited therein.

23/ NAB Reply Comments, pp. 9-10.

24/ Id.

We give the NAB credit for recognizing that statistical evidence can be quite useful in illuminating whether or not discrimination may be present. 25/ Nonetheless, the NAB has misinterpreted the data. The statistics it cites are aggregate numbers that include secretarial and janitorial jobs. As we have noted, industrywide EEO data shows race and gender disparities that are so substantial that discrimination must be inferred to be a material cause. 26/

The NAB further attributes the "relatively low proportion of management positions in broadcasting" held by minorities to "the fact that broad advancement of minorities in any industry necessarily depends on the expansion of educational and entry-level professional opportunities that unfortunately began in earnest too few decades ago. It simply takes some period of time before any industry, including broadcasting, can produce a breadth and depth of executives of a particular ethnicity, and that is the process the industry is undergoing right now." 27/

Actually, that "period of time" expired about 20 years ago. The educational institutions are a full generation ahead of the broadcasting industry in opening their doors to all. Virtually every school of broadcasting was fully integrated at some point between the mid-1970s and mid-1980s, and by 1990 most of the Historically Black Colleges and Universities' (HBCUs) broadcasting departments had been in operation for at least fifteen years. 28/ Rising through the executive ranks in television and radio seldom takes more than 10 years or so -- sometimes less. What, then, explains minorities' continued absence from those ranks except the continuation of discrimination?

25/ Acknowledging that the national workforce in 2000 was 29.2% minority and 47.1% women, the NAB "concedes" that these statistics reveal "a slight gap" from the broadcast industry's figures of 22.5% and 41.5% respectively. Id. Actually, these disparities are far from "slight", and are overwhelmingly statistically significant, when spread out over thousands of employees.

26/ See, e.g., EEO Supporters Comments, pp. 37-40 and 47-49 (citing anecdotal and statistical evidence).

27/ NAB Reply Comments at 12.

28/ On October 17, 2002, Howard University's School of Communications will celebrate its 30th anniversary.

In 2000, women were 41.5% of EEO-1-filing broadcasters' employees, but only 17.6% of technicians. 29/ The NAB contends that the paucity of women in engineering "may simply be due to social circumstances, and not discriminatory hiring practices[.]" NAB Reply Comments, p. 12. 30/ But that same argument was used for years to explain the paucity of minority engineers -- a disparity that actually has largely been cured over time. Further, what possible "societal" factors explain why minorities work extensively in sales positions in nonbroadcast fields, but not in broadcasting? 31/

The fact is that thirty-eight years after Title VII, and thirty-three years after the EEO Rule was first adopted, employment patterns in broadcasting continue to display gross disparities by race and gender. For decades, minorities and women have been trained, ready, willing and able to do every job in broadcasting. Further, for decades the industry's job turnover rate has been on the order of 25-50% per year. Consequently, if the statistical disparities are not attributable to discrimination, what could explain these lingering and substantial disparities?

In its effort to deny that discrimination still exists, the NAB has even gone so far as to contend that "[e]ven witnesses at the *en banc* hearing in support of the Commission's EEO proposal did not assert any barriers to entry of women and minorities into the broadcasting industry." 32/ That assertion is especially discomfiting, since the testimony of the witnesses themselves shows otherwise. For example:

29/ See EEOC, 2000 EEO-1 Aggregate Report, SIC 483: Radio and Television Broadcasting (supplied as Exhibit 1 to EEO Supporters Comments, and discussed therein on p. 48, n. 116).

30/ What, exactly, are the "social circumstances" that keep women from broadcast engineering careers? Is it, in the former words of Barbie, that "math is hard?" What, specifically, explains why women have recently made great strides in broadcast sales but are virtually shut out of broadcast engineering?

31/ See EEOC, 2000 EEO-1 Aggregate Report, SIC 483: Radio and Television Broadcasting (supplied as Exhibit 1 to EEO Supporters Comments, and discussed therein on p. 48, n. 116) (in 2002, minorities were 22.5% of the reporting companies' employees in all positions, including clerical, laborer and service workers, but were only 15.7% of the sales workers).

32/ NAB EEO Views.

Hugh Price: [F]rom 1982 to 1988 I was a senior executive in public broadcasting with Channel 13 in New York City....As an executive, I saw up close that this is indeed a worth of mouth industry and that people who make critical hiring decisions tend to want to rely upon known quantities are more resistant to opening it up to those who are unfamiliar than we need. 33/

Joan Gerberding: Even the newest media conglomerates seem to be reflecting old boy attitudes in their executive suites. Women are rarely represented among the top executives or on their boards of directors....AWRT [American Women in Radio and Television], whose mission is to advance the impact of women in the electronic media, is very concerned that the perpetual glass ceiling in the broadcasting industry has had too few cracks in recent years....It has taken the broadcast industry way too long to break out of the bad habits of the old boys' network and the word of mouth recruitment that have limited opportunities for advancement by well qualified women." 34/

Cathy Hughes: My career in broadcasting has been the exception to the rule, not because I am exceptional, but because the Federal Communications Commission pried open the window of opportunity that afforded me an equal chance to prove my worth in value to the broadcasting community. It is painfully evident that other members of my gender and my ethnic group have not been afforded the same opportunity, and I am obligated to do everything in my power to correct this disparity....Too much time and energy and money has been spent fighting EEO, and yet so little has been spent in an effort to correct the discriminatory practices that limit our collective potential and safeguard our future. 35/

Charles Warfield: [T]oo many companies disregard their obligations to provide equal opportunity. I'm not talking about intentional discrimination, although there's no question that there is a lot of that. I'm talking about broadcast stations that simply do the bare minimum or nothing at all to show that they care at all about bringing persons historically excluded from our profession into the fold. 36/

33/ Testimony of Hugh Price, President, National Urban League, Tr. 24.

34/ Testimony of Joan Gerberding, President, American Women in Radio and Television, Tr. 27, 30.

35/ Testimony of Cathy Hughes, Tr. 79, 83.

36/ Testimony of Charles Warfield, Tr. 101.

Finally, we note that in our Comments, we said that we knew there was discrimination, but did not know how much there was; consequently, we conservatively presumed that the percentage of discrimination by broadcasters at 10% -- half of the percentage found by scholarly research in other industries. We pointed out that even if only 10% of broadcasters discriminated, a job applicant is 50% likely to encounter discrimination by filing just seven job applications, and 80% likely to encounter discrimination by filing just 21 applications. 37/ We further noted, however, that even only one percent of broadcasters discriminating would represent 150 stations and hundreds of foregone job opportunities. 38/ As the UCC's Rev. Robert Chase asked at the en banc hearing,

> Would the IRS tolerate 150 tax cheats among 15,000 businesses? Would a town of 15,000 tolerate 150 drunk drivers or looters or polluters....Reports of unremedied discrimination are sure to frighten impressionable college freshmen away from broadcast majors and into other pursuits. It would hardly be reassuring to them to learn that only 150 broadcasters discriminate." 39/

We now acknowledge that our 10% estimate was wrong -- indeed, it was a vast understatement. The actual numbers for 1999, with respect to large broadcast and cable employers (those who filed EEO-1 forms), have been released. They are provided in a massive study, The Reality of Intentional Job Discrimination in Metropolitan America - 1999, by Alfred W. Blumrosen and Ruth G. Blumrosen (Rutgers University, 2002) (the "Blumrosens Study"). Excerpts are attached to this letter as Exhibit 1. The entire study can be found at www.eeol.com. 40/

37/ See EEO Supporters Comments, p. 21.

38/ Id. Suffice it to say that no broadcaster would regard an FCC rule that deprives it of one percent of its revenues as de minimis. Such rules are fought bitterly every day.

39/ Testimony of Rev. Robert Chase, Executive Director, Office of Communication Inc., United Church of Christ, Tr. 96.

40/ The study, three years in the making, was supported by a grant from the Ford Foundation to Rutgers University. The Blumrosens are generally regarded as the deans of modern equal employment law, having written on virtually every subject in EEO jurisprudence and having litigated many of the landmark employment discrimination decisions of the past two generations.

[n. 40 continued on p. 13]

For the cable and broadcast industries, the Blumrosens found as follows:

> **Cable and Other Pay TV Services: 19% discriminate intentionally against women, 36% discriminate intentionally against African Americans, and 20% discriminate intentionally against Hispanics.** 41/

> **Radio and TV Broadcasters: 15% discriminate intentionally against women, 20% discriminate intentionally against African Americans, and 24% discriminate intentionally against Hispanics.** 42/

40/ [continued from p. 12]

Alfred Blumrosen is the Thomas Cowan Professor of Law at Rutgers, where he has taught since 1955. Among his many achievements are his service, beginning in 1965, in assisting with organizing the EEOC and his service as its first Chief of Conciliations and Director of Federal-State Relations. He has also served as a Special Attorney in the Civil Rights Division of the U.S. Department of Justice, as a Consultant to Assistant Secretary of Labor Arthur Fletcher (1969-1971), and as the EEOC's consultant concerning Guidelines on Employee Selection Procedures (1977-1979).

Ruth Blumrosen, Adjunct Professor of Law at Rutgers, also assisted in the establishment of the EEOC in 1965, where she was Acting Director of Compliance. Among her many accomplishments were her service as consultant to the EEOC concerning guidelines under the Equal Pay Act and wage discrimination issues (1979-1980), and her victory in the case that established the federal constitutionality of state fair housing laws.

41/ Blumrosens Study, p. 204. The total numbers of affected workers were 1,366 women, 2,536 African Americans and 658 Hispanics -- a total of 4,559 people. Id.

42/ Id., p. 205. The total numbers of affected workers were 1,340 women, 940 African Americans and 1,131 Hispanics, for a total of 3,411 people. Id.

Certainly these statistics are an improvement over the nearly 100% of firms that discriminated intentionally against minorities and women before the FCC adopted its EEO rules. But they should shock and appall every fair-minded broadcaster and cable operator -- especially since these figures apply to the largest firms and do not even include any firm with fewer than 50 employees -- i.e., most of the radio industry. 43/

The Blumrosens Study represents the first systematic national analysis of EEO-1 data, using the time-tested statistical paradigm long accepted by the courts for statistical proof of systemic discrimination.

43/ Our Comments gave the formula for determining the probability that a job applicant, who randomly sends several applications to a large population of employers, will encounter discrimination, depending on the percentage of firms in the industry that discriminate. EEO Supporters Comments, pp. 20-21. Specifically, we reported that if just 10% of employers discriminate, and "the job applicant files just seven applications, there is at least a 50% chance that at least one of the applications has landed on the desk of a discriminator. If she files just fifteen applications, there is at least an 80% chance that at least one of the applications has landed on the desk of a discriminator." Id., p. 21 (emphasis in original). We also noted that if 20% of employers discriminate (as turns out approximately to be the case for cable against women and Hispanics and for broadcasting against African Americans, "if the job applicant files just three applications, there is at least a 50% chance that at least one of the applications has landed on the desk of a discriminator. If she files just seven applications, there is at least an 80% chance that at least one of the applications has landed on the desk of a discriminator." Id., p. 21 n. 71. Further, at the 24% rate at which the Blumrosens Study found that broadcasters discriminate against Hispanics, we calculate that if the job applicant files just three applications, there is at least a 56% chance that at least one of the applications has landed on the desk of a discriminator; and if she files just seven applications, there is at least an 85% chance that at least one of the applications has landed on the desk of a discriminator. Finally, at the 36% rate at which the Blumrosens Study found that cable companies discriminate against African Americans, we calculate that if the job applicant files just three applications, there is at least a 74% chance that at least one of the applications has landed on the desk of a discriminator; and if she files just seven applications, there is at least an 96% chance that at least one of the applications has landed on the desk of a discriminator.

The Blumrosens Study examined the 1999 EEO-1 data for thousands of employers. The study ascertained, for dozens of industries, the percentage of EEO-1 reporting firms that are presumed under the law to be engaging in intentional discrimination against women, African Americans or Hispanics. As the Blumrosens explain:

> Workers affected by this discrimination were measured by the difference between the number actually employed and the number that the apparent discriminator would have employed if it had employed minorities/women at the average. This is the standard the Supreme Court has applied in cases of intentional discrimination. There is no single average in the study. For each occupation in each establishment, the average utilization varies depending on the number of qualified available workers in the labor market, industry and occupation. The average is not a quota - it is a fact, showing how similar employers have employed minorities and women in the same occupation under the same labor market and industrial circumstances.
>
> The study addresses some of the most common employer explanations for such low levels of minority and female employment, such as women aren't interested in the work, [they are doing the same work for other similar employers]; no qualified workers were available [qualified workers were available because they were doing the same type of work for other employers.] 44/

The methodology of the study was foreshadowed by Justice O'Connor's opinion in EEOC v. Shell Oil, in which she noted that it is "only in a comparison" between an employer's EEO-1 data and those of other, similarly situated employers "that a pattern of discrimination becomes apparent." 45/

44/ Blumrosens Study, p. xiv.

45/ EEOC v. Shell Oil, 466 U.S. 54, 72 (1984) ("Shell Oil") (Burger, Rehnquist and Powell joining in the opinion).

The standard used in the study is the "presumption that intentional discrimination is present when an establishment is more than two standard deviations below the average among its peers...an evidentiary principle designed by the Supreme Court to flush out 'clandestine and covert' intentional racial discrimination against minorities." 46/ At this two standard deviation level, "there is less than once chance in twenty (5%) that it would have occurred by chance." 47/

As shocking as the Blumrosens' data are, the actual percentage of firms that discriminate is likely to be considerably greater than the percentages found in the Blumrosens Study:

> Our data cannot particularize the myriad discriminatory practices and events that take place beyond the view of our computer screen and contribute to the restriction on opportunity reflected in the statistics. These acts may include discriminatory recruiting and hiring practices, job assignment patterns, limitations on promotional and training opportunities, layoff and discharge practices, creating a hostile work environment, denying equal pay to minorities or women, or resisting employment of minorities or women in certain occupations by an entire industry or labor market. Nor can we "see" discrimination that takes place outside of Metropolitan Areas, or by employers of 50 or fewer workers. In addition, we require that an establishment have at least 20 employees in an occupational category to consider it in connection with that category. Many smaller establishments will not have 20 employees in any single occupational category, and will not be considered in connection with that category.
>
> Since the majority of the work force is employed by employers who are not "visible" to our study and since discriminatory patterns appear to be similar among different sized

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46/ Id., p. 35, discussing Teamsters v. U.S., 431 U.S. 324, 335 n. 15 (1977). Additional authorities are provided in the Blumrosen Study, p. 228 n. 169.

47/ Blumrosens Study, p. 43. Actually, "90% of the discriminating establishments were at least 2.5 standard deviations below the average utilization by their peers. This means that there were no more than one in 100 chances that the result was accidental." Id., p. 63.

> employers...we have reason to believe that the extent of intentional job discrimination may be at least double that which we have observed. 48/

While the Blumrosen Study does not pinpoint which specific broadcasters or cable companies discriminate, it does show that in 19% to 36% of the reporting units, the disparity between minority and female representation of qualified persons, and their actual employment in these positions in the reporting unit, is so extreme that the federal courts would presume that intentional discrimination is the cause.

The study was necessary because, as we have pointed out in detail, discrimination is generally hidden from view. 49/ This kind of systemic statistical analysis is the only way to quantify the extent of discrimination in an industry.

The Blumrosens Study should put to rest the question of whether there is "sufficient" discrimination to justify a rule to prevent discrimination. Even if the Blumrosens' math were off by a factor of ten, the extent of discrimination would still shock the conscience.

No one but God can determine with absolute precision how much of the deep underutilization of minorities and women in broadcasting and cable is attributable to present-day discrimination. Further, the evidentiary burden needed to prove that a specific company discriminated is high. However, the test for concluding that a substantial part of present-day minority and female underutilization is caused by present-day discrimination is "rational basis." In light of the Blumrosens Study, it is absurd to maintain that present-time discrimination is not a very substantial contributing cause of minority and female underutilization in broadcasting and cable. We sincerely hope that the STBAs and the NAB will review the Blumrosens Study, acknowledge that they were terribly wrong, and join us in our efforts to stamp out discrimination in their industries.

48/ Blumrosens Study, p. 12. In addition to requiring that an employer have at least 20 employees in the occupational category examined, they required "that there be two other establishments with at least 20 employees in that occupation; that there be at least 120 employees in the occupation in the MSA; and that no establishment have more than 80% of the employees in order to have sufficient employment to assure that there was a labor market for such workers, and that no single establishment dominated the market." Id., p. 30.

49/ See EEO Supporters Comments, pp. 41-45.